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International Covenant on Civil and Political Rights

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Human Rights Committee

Communication No. 2000/2010

Views adopted by the Committee at its 113th session (16 March–2 April 2015)

Submitted by:	Yuba Kumari Katwal (represented by counsel, Track Impunity Always–TRIAL)
Alleged victim:	Chakra Bahadur Katwal (the author's husband) and the author herself
State party:	Nepal
Date of communication:	27 October 2010 (initial submission)
Document references:	Special Rapporteur's rule 97 decision, transmitted to the State party on 8 November 2010 (not issued in document form)
Date of adoption of Views:	1 April 2015
Subject matter:	Enforced disappearance; right to life
Procedural issues:	Exhaustion of domestic remedies
Substantive issues:	Right to life; prohibition of torture and cruel and inhuman treatment; right to liberty and security of person; respect for the inherent dignity of the human person; recognition as a person before the law; and right to an effective remedy
Articles of the Covenant:	Articles 2 (3); 6 (1); 7; 9 (1–4); 10 (1); and 16
Article of the Optional Protocol:	Article 5 (2 (b))

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Annex

Views of the Human Rights Committee under article 5 (4) of the Optional Protocol to the International Covenant on Civil and Political Rights (113th session)

concerning

Communication No. 2000/2010*

Submitted by:	Yuba Kumari Katwal (represented by counsel, Track Impunity Always–TRIAL)
Alleged victim:	Chakra Bahadur Katwal (the author's husband) and the author herself
State party:	Nepal
Date of communication:	27 October 2010 (initial submission)

The Human Rights Committee, established under article 28 of the International Covenant on Civil and Political Rights,

Meeting on 1 April 2015,

Having concluded its consideration of communication No. 2000/2010, submitted to the Human Rights Committee by Yuba Kumari Katwal under the Optional Protocol to the International Covenant on Civil and Political Rights,

Having taken into account all written information made available to it by the author of the communication and the State party,

Adopts the following: ...

Views under article 5 (4) of the Optional Protocol

1.1 The author of the communication is Yuba Kumari Katwal, a Nepalese national born in 1961. She submits the communication on her behalf and on behalf of her missing husband, Chakra Bahadur Katwal, a Nepalese national born in 1953. She claims that Nepal has violated the rights of her husband under articles 6 (1), 7, 9 (1–4), 10 and 16, alone and read together with article 2 (3) of the International Covenant on Civil and Political Rights. She also claims that Nepal has violated her rights under article 7, alone and read together with article 2 (3) of the Covenant. The Optional Protocol entered into force for the State party on 14 August 1991. The author is represented by counsel — Track Impunity Always (TRIAL).

* The following members of the Committee participated in the consideration of the present communication: Yadh Ben Achour, Lazhari Bouzid, Sarah Cleveland, Olivier de Frouville, Yuji Iwasawa, Ivana Jelić, Duncan Muhumuza Laki, Photini Pazartzis, Mauro Politi, Sir Nigel Rodley, Victor Manuel Rodriguez-Rescia, Fabián Omar Salvioli, Dheerujlall Seetulsingh, Anja Seibert-Fohr, Yuval Shany, Konstantine Vardzelashvili and Margo Waterval.

1.2 On 2 February 2011, upon the State party's request, the Committee, acting through its Special Rapporteur on new communications and interim measures, decided that the admissibility of the communication should be considered separately from the merits.

The facts as submitted by the author

2.1 The author's husband, Mr. Katwal, was the headmaster of Shree Kuibhir Secondary School in Kuibhirtar, Okhaldhunga District. On 9 December 2001, Mr. A., an assistant teacher working in the school, delivered to Mr. Katwal a letter signed by an officer of the District Education Office, requesting him to appear at the said Office, without specifying the purpose. On 12 December 2001, Mr. Katwal left his village, in the company of Mr. A., to go to the District Education Office. It was Mr. A. who described to the author and her daughter the sequence of events that followed.

2.2 Once Mr. Katwal and Mr. A. arrived at the District Education Office on the morning of 13 December 2001, they were directed to the District Administration Office. There, Mr. Katwal, still in the presence of Mr. A., was told by the Chief District Officer to go to the army barracks. Mr. Katwal went there, but this time unaccompanied. The last time Mr. A. saw him was the following morning, when soldiers were carrying him by his arms and legs from the army barracks to the District Police Office. He was severely injured, his clothes were covered with bloodstains, his eyes were closed and he appeared to be unconscious.[1]

2.3 The author tried on numerous occasions to establish the whereabouts of her husband and to gather information on his fate. These attempts were curtailed, rather than facilitated, by the authorities, none of which acknowledged responsibility for the arrest of Mr. Katwal, referring the author from one place to another.

2.4 On 26 January 2005, the author's daughter was arrested and interrogated by the 18th Brigade of the Royal Nepalese Army. Already weak due to a health problem and a subsequent stay in hospital, she was ill-treated during the six weeks of her detention. She was released at the end of March 2005 in exchange for 40,000 Nepali rupees (Nr) paid by the author.[2]

2.5 In December 2005, the author accompanied her daughter to a hospital in Kathmandu for medical treatment. On 4 January 2005, on her way back, the author was arrested by a group of soldiers near Jhapre. During the following 13 days, she was repeatedly beaten, insulted and interrogated by military personnel about her and her daughter's possible connection with the Maoists. On 16 January 2005, she was brought to the District Police Office and then to the District Administration Office; she was finally released after her identity was verified. Following this, she was admitted to hospital for two weeks and has continued to suffer pain ever since. She had to undergo medical treatment for her back and leg injuries.

2.6 Meanwhile, in July 2005, the author's daughter contacted a lawyer in Kathmandu, who took on her father's case and prepared a habeas corpus writ, which was filed in a joint case on disappearances to the Supreme Court of Nepal. On 20 August 2006, the Supreme Court ordered the establishment of the Prisoner Investigation Team, charged with investigating the status of a number of petitioners and identifying the persons and offices/authorities involved in the arrest. The case of Mr. Katwal was included in the mandate of the Team. While the methodology of the Prisoner Investigation Team is

[1] In 2007, two teachers from the victim's school provided similar testimonies.

[2] On 30 March 2005, Nr 40,000 was approximately US$ 560. *Source*: Nepal Rastra Bank (Central Bank of Nepal) (http://nrb.org.np).

unclear, its report contains details of the torture and ill-treatment Mr. Katwal was subjected to while in custody. It establishes that officials tried to cover up the circumstances of his death and identifies the persons allegedly responsible.

2.7 The author explains that the report of the Prisoner Investigation Team mentions that the body of the victim was buried in a pit near the local Chandale Stream Khola and a group of soldiers were supposed to burn the remains a few days after his death, to destroy all evidence. However, the Team states that the soldiers did not find the body, and that therefore it was not burned. On this point, the Verification Committee of the Ministry of Home Affairs differs with the Team in finding that the body was in fact exhumed from its original grave 8 to 10 days after the death and burned on the same spot. No statement was made as to whether the Prisoner Investigation Team itself tried to locate the body. The body of the victim was never returned to the author's family.

2.8 Based on the conclusions reached by the Prisoner Investigation Team, the Supreme Court of Nepal made the following finding on 1 June 2007: "The investigation undertaken [...] reveals that Mr. Chakra Bahadur Katwal of writ No. 632 had appeared at the office of the Chief District Officer in person on 13 December 2001, and was put in illegal detention by the order of the Chief District Officer at the District Police Office; he was then transferred to the army barracks. He was killed on 16 December 2001 due to cruel torture inflicted upon him by army officers."

2.9 The Supreme Court ordered the investigation and subsequent prosecution of those responsible for the victim's disappearance and death, as identified in the report of the Prisoner Investigation Team. In addition to finding that Mr. Katwal was dead and ordering the prosecution of those responsible, the ruling of the Supreme Court of 1 June 2007 instructed the payment of immediate relief to the next of kin of the victim.

2.10 Eight months after the ruling of the Supreme Court was delivered, Mr. Katwal's family was provided with Nr 200,000 by the Home Ministry.[3] On 29 June 2009, the author received Nr 100,000 from the Peace Ministry.[4] The author did not receive any other compensation as a relative of a disappeared person. She declares that she spent at least Nr 720,000 in relation to her husband's disappearance and her daughter's and her own arrests and torture. The author does not receive her husband's pension and can do only limited work because of the injuries she received as a result of the beatings.

2.11 In addition to these proceedings, in February 2006, the author's daughter submitted a complaint about her own arrest to the National Human Rights Commission, which had already registered the author's complaint concerning the disappearance of her husband. Furthermore, the International Committee of the Red Cross added Mr. Katwal's name to their database further to a request by the author's daughter.

2.12 The author has exhausted all available and effective domestic remedies. The decision of the Supreme Court rendered on 1 June 2007 is final and binding. The Court itself stated that no further investigation with regard to the author's husband needed to be carried out since it considered the investigation of the Prisoner Investigation Team to be a "judicial one", whose "conclusion [...] [was] final regarding the condition" of Mr. Katwal. However, the ordered prosecution of those responsible has not taken place. The author notes that no other remedy is available in Nepal to which the author could turn in search of redress.

[3] On 31 December 2007, Nr 200,000 was approximately US$ 3,130. *Source*: Nepal Rastra Bank (Central Bank of Nepal), http://nrb.org.np.

[4] Approximately US$ 1,300. *Source*: Nepal Rastra Bank (Central Bank of Nepal), http://nrb.org.np.

The complaint

3.1 The author submits that the State party violated articles 6 (1), 7, 9 (1–4), 10 and 16, alone and read together with article 2 (3) of the Covenant with regard to Mr. Katwal, owing to his arrest, detention, torture and enforced disappearance, and in the light of the State party's ongoing failure to conduct an ex officio prompt, impartial, independent and thorough investigation in order to establish his fate and whereabouts, as well as to identify, prosecute and punish those responsible for these crimes.

3.2 The State's obligation to protect the right to life includes the duty to prevent and punish arbitrary deprivation of life by criminal acts but also to prevent arbitrary killing by their own law enforcement personnel. Therefore, the law must strictly control and limit the circumstances in which a person may be deprived of his life by authorities of the State.[5] The victim was last seen in the hands of the authorities. In the absence of other information, the circumstances give rise to a strong presumption that State agents deprived him of his life, an element which was later acknowledged by the Supreme Court. The author therefore considers that article 6 (1) of the Covenant was violated in her husband's regard. Moreover, the victim was last seen in December 2001 and no investigation about his disappearance was conducted until 2007. Only after the Supreme Court order based on the habeas corpus writ filed by the author's daughter was an investigation carried out into the fate of Mr. Katwal. The State party did not therefore conduct an ex officio and prompt investigation. In addition, the investigation ordered by the Supreme Court was a judicial investigation. No criminal investigation by the police or the prosecutor was initiated. The Court limited itself to stating that the victim had died, without providing the family with information on the fate of the victim's remains. As for the criminal responsibility of the alleged perpetrators, the investigation was confined to the enumeration of the persons responsible, but no criminal investigation or prosecution was ever initiated. The author therefore also considers that article 6, read in conjunction with article 2 (3) of the Covenant, has been violated regarding her husband.

3.3 The author further contends that the State party has violated the prohibition of torture in respect of Mr. Katwal. The link between secret detention and the elevated risk of torture was confirmed by the Committee in its own jurisprudence.[6] The author also refers to article 17 of the International Convention for the Protection of All Persons from Enforced Disappearance. In the present case, all elements, including the Supreme Court's ruling, point to the fact that Mr. Katwal was tortured. The author requests the Committee to identify the acts committed against her husband as torture and not a mere violation of article 7 of the Covenant.

3.4 The author also claims a violation of article 7, alone and read together with article 2 (3) of the Covenant with regard to herself, due to the anguish suffered by her and her family as a consequence of the enforced disappearance of her husband and the State party's failure to provide for adequate reparations. Threats and recourse to ill-treatment and torture have been made with regard to her and her daughter, and false explanations about the disappearance have been given over a prolonged period, thus aggravating the suffering endured by the author and her family. In addition, the author was not able to perform the ceremonial burial as required by her religion.

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[5] The author refers to the Committee's general comment No. 6 (1982) on the right to life, para. 3, and the Committee's jurisprudence in its communication No. 154/1983, *Baboeram et al* v. *Suriname*, Views adopted on 4 April 1985, para. 14.3.

[6] The author refers inter alia to communication No. 1327/2004, *Grioua* v. *Algeria*, Views adopted on 10 July 2007, para. 7.6.

3.5 She further claims that the State party has violated Mr. Katwal's rights under article 9 (1–4), of the Covenant, as from 13 December 2001 onwards he was subjected to arrest and detention at the hands of the security personnel both in the army barracks and in the District Police Office. However, there is no evidence indicating the basis for depriving him of his liberty, under which procedure, whether the reasons for his arrest were disclosed to him and if, at any stage, his deprivation of liberty was the object of judicial scrutiny of any sort.

3.6 The author points out that prolonged isolation and deprivation of communication are in themselves cruel and inhuman treatment, harmful to the psychological and moral integrity of the person and a violation of the right of any detainee to respect for his inherent dignity as a human being.[7] The Committee itself has considered that enforced disappearance per se constituted a violation of article 10 of the Covenant and that the burden of proof in this respect was incumbent on the State party.[8] The author therefore considers that the enforced disappearance of her husband as well as the subsequent conditions he was subjected to following his arrest constitute a violation of article 10 of the Covenant. The lack of ex officio investigation into the matter further constitutes a violation of article 10 read in conjunction with article 2 (3) of the Covenant.

3.7 The victim was arrested, detained and last seen at the hands of the army and the police of the State party. He was never brought before a judge or a judicial officer, his arrest and detention were never reviewed and he was never seen again. Mr. Katwal was thereby placed outside the protection of the law, in violation of article 16 of the Covenant.

3.8 The ruling of the Supreme Court cannot be considered an adequate remedy since the investigation ordered did not in itself live up to the standard required by article 2 of the Covenant. Even though the Supreme Court ordered proceedings to be initiated, the State party's authorities have continuously failed to implement the ruling. No criminal investigation, prosecution or punishment of those responsible for the disappearance of Mr. Katwal has taken place. Moreover, the author has not been adequately compensated. Only taking into account the material damage suffered, the author has spent Nr 720,000 as a result of the disappearance. This amount does not take into account the mental suffering caused to her and her family, the loss of her husband's salary and the loss of opportunities to work during the time she was engaged in searching for her husband. The author has only received Nr 300,000 from the State party authorities. As claimed above, such compensation is not considered to be adequate.

3.9 The author requests that, pursuant to article 2 of the Covenant, the State party should order an independent investigation as a matter of urgency with a view to locating Mr. Katwal, and exhume, identify and return his remains to the author. She also requests the State party to bring the perpetrators of the deprivation of liberty, torture and enforced disappearance of Mr. Katwal before the competent authorities for prosecution, judgement and sanction, and to disseminate publicly the results of this measure. She requests a guarantee that she will obtain integral reparation, including prompt, fair and adequate compensation.[9] As a guarantee of non-repetition, the State party should amend its

[7] The author refers to the jurisprudence of the Inter-American Court of Human Rights in its judgement of 29 July 1988, *Velásquez Rodríguez* v. *Honduras*, para. 156.

[8] The author refers to the Committee's jurisprudence in communication No. 1469/2006, *Sharma* v. *Nepal*, Views adopted on 28 October 2008, para. 7.7.

[9] Additionally, the author requests that the measures of reparation cover material and moral damages and incorporate measures aimed at providing restitution, rehabilitation, satisfaction (including restoration of dignity and reputation) and guarantees of non-repetition. In particular, the author requests that the State party acknowledge its international responsibility, on the occasion of a public ceremony, in the presence of the authorities representing the State and of the author, to whom an

legislation in order to make effective the decisions of the judiciary with regard to the necessity to criminally investigate, prosecute and punish the perpetrators of torture and enforced disappearance.

State party's observations on admissibility

4.1 By note verbale of 31 January 2011, the State party submitted its observations, challenging the admissibility of the communication on the grounds of non-exhaustion of domestic remedies. It states that the author's husband was arrested in the District Administration Office on 13 December 2001 and then taken away by security personnel.[10] The author's daughter filed a writ of habeas corpus before the Supreme Court against the Ministry of Home Affairs and others. The Supreme Court in its verdict stated that the Prisoner Investigation Team had found that Mr. Katwal had died following his torture in detention. The Court ordered the Government to conduct a criminal investigation and prosecute the officers and agencies involved in those acts in accordance with the applicable legislation.

4.2 Pursuant to the Court's ruling, a First Information Report was lodged with the District Police Office of Okhaldhunga district. The investigation is ongoing. The State party emphasizes that it is committed to taking legal action against the persons responsible on the basis of facts and evidence derived from the investigation. In this regard, a First Information Report has been lodged for homicide and the investigation has not been finalized. Domestic remedies have thus not been exhausted.

4.3 The events described in the communication occurred during the armed conflict. To address this special situation, the State party decided to establish a commission to investigate cases of disappearances and a Truth and Reconciliation Commission as provided for in article 33 (s) of the 2007 Interim Constitution of Nepal and in clause 5.2.5 of the Comprehensive Peace Agreement of 21 November 2006. To this end, the Truth and Reconciliation Commission Bill and the Enforced Disappearance (Offence and Punishment) Bill, prepared following extensive consultations and involving the participation of all stakeholders, have been submitted to Parliament and are under active consideration by the relevant legislative committees. The two commissions to be formed after endorsement of those bills shall investigate incidents that occurred during the conflict and bring to the surface the truth about cases of disappearance, including that of Mr. Katwal. All individuals who have been affected by the conflict, including the author, shall have an opportunity to present their case and express their views before those commissions.

4.4 The activities of the two commissions shall in no way substitute the application of the existing criminal law. The bill on enforced disappearance has been designed to establish enforced disappearance as a crime punishable by law; to allow for the establishment of the truth by investigating the incidents that happened during the armed conflict; to end impunity by paving the way for taking appropriate action against the perpetrators; and to provide appropriate compensation and justice to victims. Likewise, the Truth and Reconciliation Commission Bill states that the individuals involved in enforced disappearances shall not be granted amnesty under any circumstances. Due action shall be taken, in conformity with the law, against the individuals found guilty after the

official apology should be issued. She also requests that the State party provide her with medical and psychological care immediately and free of charge, through its specialized institutions, and grant her access to free legal aid where necessary, in order to ensure available, effective and sufficient remedies.

[10] The State party does not provide further details on the security personnel referred to.

comprehensive inquiry, and investigations are to be carried out by the two commissions to be formed once the bills are approved. The commissions will be authorized to investigate any individual, including those who are no longer in their official positions.

4.5 It cannot be argued that justice will not be met simply because these bills are not yet in force. It is a recognized practice around the world to constitute truth and reconciliation commissions in order to address cases emanating from the special situation of an armed conflict, to shed light on those cases and facilitate the prosecution of alleged perpetrators and at the same time favour reconciliation for sustainable peace.

4.6 The State party further argues that the facts as submitted by the author differ from the content of the writ of habeas corpus filed by the author's daughter before the Supreme Court. At that time, she stated that the author's husband had been arrested by the Royal Nepalese Army at the District Education Office, whereas in the communication before the Committee, the author stated that Mr. Katwal went to the army barracks on his own as instructed by the District Education Officer. The State party therefore contends that the author is exaggerating the facts before the Committee. It further argues that the author's allegation that her daughter was arrested by the 18th Brigade of the Royal Nepalese Army, tortured and released upon paying Nr 40,000 is baseless. The Terrorist and Destructive Activities Ordinance did not have any provisions on monetary penalty and the author has not been able to submit any evidence to support her claim, which contradicts her assertion.

4.7 With regard to the alleged perpetrator of the act of torture against Mr. Katwal, the Prisoner Investigation Team stated in its report that the then Captain Dinesh Thapa was found to be responsible for inflicting torture on Mr. Katwal. Captain Thapa died while in service on 28 October 2002 during an offensive by the then insurgents at the Rumjatar Post of Okhaldhunga.

4.8 The author has acknowledged before the Committee that Mr. Katwal's family received Nr 300,000 as interim relief. The State party understands that this sum is not sufficient and can in no way compensate for the pain and anguish suffered by the family of Mr. Katwal. However, that amount is provisional and the State party is committed to providing additional relief on the basis of the recommendations made by the transitional justice mechanisms to be set up in the near future.

4.9 On the ground that the State party is committed to conducting appropriate and comprehensive inquiries into all the cases of enforced disappearance that took place during the 10-year armed conflict and that it has already taken steps towards finding an appropriate domestic remedy in the spirit of the Interim Constitution, the Comprehensive Peace Agreement and directives of the Supreme Court, the State party is of the view that the communication submitted by the author should be dismissed.

4.10 The State party further explains that it is always alert to the need that the activities undertaken by the Nepalese army, armed police and other security agencies are in conformity with human rights. In this respect efforts were deployed through training and orientations to promote and protect human rights, which have improved remarkably. Training of security forces has been carried out in cooperation with the country presence of the Office of the United Nations High Commissioner for Human Rights in Nepal (OHCHR-Nepal).

4.11 Protecting human rights, promoting democratic values and norms and ending impunity are the utmost priorities of the State party. The State party has gone through democratic political transition and it is diligently working towards creating a favourable atmosphere for all to enjoy their rights and fundamental freedoms. It therefore requests the Committee to dismiss the communication on the basis of all the grounds mentioned in its observations.

Author's comments on the State party's observations

5.1 On 4 May 2011, the author commented on the State party's observations on admissibility. With regard to the exhaustion of domestic remedies, the author refers to the jurisprudence of the Committee where it has considered that those remedies must not only be available but also effective.[11] Such national remedies have to be exhausted to put the State in a position to redress its violation. The Committee has considered that whenever the highest domestic tribunal has decided the matter at issue, no other remedies must be exhausted.[12] The Committee has further considered that domestic remedies must not be unduly prolonged[13] and need not be exhausted without reasonable prospect of success.[14] With regard to violations of the right to life and of the prohibition of torture or cruel, inhuman or degrading treatment, an investigation is considered effective if it is prompt, thorough, independent and impartial.[15] Furthermore, the investigation must be carried out ex officio, without the victims or their relatives having to submit a complaint.

5.2 In the present case, the author contests the State party's assertion that the investigation is ongoing and therefore domestic remedies have not been exhausted. In this context, the author recalls that in a ruling dated 1 June 2007 regarding Mr. Katwal, the Supreme Court ordered an investigation in order to have those responsible for such violations prosecuted and punished. The State party gave no precise information, such as the date and concrete evidence, about the First Information Report allegedly lodged with the District Police Office of Okhaldhunga district.

5.3 Almost 10 years[16] had elapsed since the disappearance and subsequent torture and death of the author's husband. Were any serious investigation under way, the State party would have been in a position to explain the steps taken and the prospects of the investigation. The State party should have long ago framed charges against the perpetrators and brought them to justice, punished and jailed them. The author notes that the State party does not even allege that the culprits might soon be taken into custody, be charged with the crime and brought to trial. As enforced disappearance and torture are not codified in Nepalese law, the investigation certainly concerns other offences. The State party is under an obligation to provide victims and their relatives with information about the state of the investigation. The State party has not done so before the Committee and, on the contrary, has remained vague as to the nature of the steps taken. In March 2010, OHCHR-Nepal contacted the police and prosecution officials regarding the present case, and the latter replied that they were unaware of progress in the investigation. The prosecutor's office reported that no recent update had been received from the police. The same observation was made by OHCHR-Nepal following a visit to Okhaldhunga district, which took place from 22 to 25 February 2011. The author was also informed that the report of the probe commission set up by the Supreme Court, on which the Court largely based its ruling of 1 June 2007, was not yet even in the hands of the Okhaldhunga police. Officials from the

[11] The author refers to communication No. 220/1987, *T. K.* v. *France*, Views adopted on 8 November 1989, para. 8.2.

[12] The author refers to communication No. 1023/2001, *Länsman et al.* v. *Finland*, Views adopted on 17 March 2005, para. 6.3.

[13] The author refers to communication No. 1619/2007, *Pestaño* v. *Philippines*, Views adopted on 23 March 2010, para. 6.4.

[14] The author refers to communication No. 458/1991, *Mukong* v. *Cameroon*, Views adopted on 21 July 1994, para. 8.2.

[15] The author refers inter alia to general comment No. 31 (2004) on the nature of the general legal obligation imposed on States parties to the Covenant, para. 15.

[16] Almost 11 years at the time of consideration of the admissibility by the Committee.

Okhaldhunga police refused to confirm this or transmit official information on the progress of the investigation in writing.

5.4 The author contests the State party's argument that Truth and Reconciliation Commission and the Enforced Disappearance Commission will better address the issue of accountability. She notes that the State party is contradicting itself. While mentioning that a criminal investigation is ongoing, without providing details on progress made, the State party considers that future transitional justice will provide for better solutions. Its position is that due action shall be taken after a comprehensive investigation is carried out by the two commissions to be formed once the bills become law. This statement is a clear indication that there exists no reasonable prospect of success for a prompt and effective investigation and prosecution. The author contends that there is no certainty as to whether the bills will be passed, when they will be passed or their consequences on victims. The author therefore rejects the State party's argument that such commissions constitute prompt, independent and effective investigation and prosecution. The author recalls that the commissions are not judicial bodies and it has not been established that they will have the power to impose the appropriate punishment for human rights offenders.

5.5 Should the State party's argument be that transitional justice mechanisms are better suited to handle the author's right to a prompt, independent and effective investigation and prosecution of the culprits than ordinary criminal proceedings, it should be rejected by the Committee. The long delays already suffered and which continue to affect the carrying out of an effective investigation must have had consequences on the collection of evidence and testimonies against alleged perpetrators.

5.6 The author therefore considers that the absence of an effective investigation into her husband's enforced disappearance, torture and subsequent death more than 10 years after the facts, on the mere justification that transitional justice yet to come will better address the issue, is an undue prolongation of the domestic remedies.[17]

5.7 As for the other grounds invoked in the State party's observations, the author considers that they are not related to admissibility but to the merits of the case. She specifically refers to the State party's contention that some facts of the case are contradictory, as well as to the issues of interim relief and the death of the alleged perpetrator. These issues will therefore be addressed by the author on the merits should the Committee declare the communication admissible.

5.8 On 1 November 2011, the author further submitted that the constant postponement of effective criminal investigations is a tool designed to perpetuate impunity and blatantly deny any form of accountability for past human rights violations. In October 2008, the Government of Nepal took a decision to withdraw 349 criminal cases against numerous political party cadres, including two senior members of the Cabinet itself. The withdrawal was said to be necessary to promote the peace process and fully implement the Comprehensive Peace Agreement by enforcing a provision that called for the withdrawal of cases brought against individuals for political reasons.[18] In reality, as opposed to political charges, the most frequent offences alleged in those cases were murder and attempted murder, along with other serious crimes such as rape and mutilation.

5.9 Several orders from the Supreme Court have recently suspended district court decisions to issue arrest warrants over murder charges against high-ranking political members, endorsing the Government position that these cases will be better dealt with by

[17] The author refers to the jurisprudence of the Committee in *Sharma* v. *Nepal*, para. 6.3 and in communication No. 1250/2004, *Rajapakse* v. *Sri Lanka*, Views adopted on 14 July 2006, para. 6.2.

[18] Clause 5.2.7 of the Comprehensive Peace Agreement of 21 November 2006.

the future transitional justice mechanisms. The author considers these trends to be very worrying for democracy and the principle of separation of powers.

5.10 The author further submits that in August 2011, the Unified Communist Party of Nepal-Maoist struck a four-point political agreement with the United Democratic Madhesi Front in return for the latter's support for its prime ministerial candidate Baburam Bhattarai. Despite pledging, in its third point of the deal, to inter alia uphold fundamental rights, in its second point it states that "all the court cases against those involved in the Maoist insurgency, Madhes movement, Janjati movement, Tharuhat movement and Dalit and Pichadabarga movements will be dropped and they will be given general amnesty". This agreement was endorsed by Mr. Bhattarai when he was appointed as Prime Minister and was also endorsed by the Attorney General appointed following the Prime Minister's nomination. This tendency reveals a willingness to protect politically connected individuals from criminal liability. The results of these worrying decisions have been a de facto amnesty and impunity for the perpetrators of hundreds of crimes.

5.11 The author refers to the jurisprudence of the Inter-American Court of Human Rights where the Court has considered that the prohibition of the forced disappearance of persons and the related duty to investigate and punish those responsible has the nature of *jus cogens*. As such, the forced disappearance of persons cannot be considered a political crime or related to political crimes under any circumstance, to the effect of preventing the criminal prosecution of this type of crime or suppressing the effects of a conviction.[19]

5.12 The author concludes that the lateness of the transitional justice mechanism, the inadequacy of the current proceedings regarding Mr. Katwal's disappearance and the arbitrariness of the latest decisions on criminal case withdrawals and review are signs of a lack of appropriate remedial procedures in Nepal.

Committee's decision on admissibility

Consideration of admissibility

6.1 At its 106th session, on 10 October 2012, the Committee examined the admissibility of the communication.

6.2 The Committee ascertained, as required under article 5 (2 (a)) of the Optional Protocol, that the same matter was not being examined under another procedure of international investigation or settlement.

6.3 With regard to such potential future transitional justice mechanisms as the Truth and Reconciliation Commission and the Enforced Disappearance Commission, the Committee recalled that it was not necessary to exhaust avenues before non-judicial bodies to fulfil the requirements of article 5 (2 (b)) of the Optional Protocol.[20] With respect to the requirement of the exhaustion of domestic remedies, the Committee noted the author's attempt to obtain a domestic remedy by submitting a writ of habeas corpus to the Supreme Court in 2005 and considered that the State party had provided no concrete information on the First Information Report allegedly lodged by it and thus had not demonstrated that a criminal investigation was being carried out, more than 11 years after Mr. Katwal's arrest, and that it was effective in the light of the serious and grave nature of the violations alleged by the author.[21] The Committee found that the delay in carrying out an effective investigation had

[19] The author refers to the Inter-American Court of Human Rights, in its judgement of 26 November 2008, *Tiu Tojin* v. *Guatemala*, para. 91.

[20] See communication No. 1761/2008, *Giri* v. *Nepal*, Views adopted on 24 March 2011, para. 6.3.

[21] Ibid., para. 6.3.

been unreasonably prolonged and concluded that it was not precluded from considering the communication under article 5 (2 (b)) of the Optional Protocol.

6.4 The Committee declared the communication admissible with respect to the claims under articles 6 (1), 7, 9, 10 and 16, alone and read in conjunction with article 2 (3), in relation to the author's husband, as well as with respect to article 7, read in conjunction with article 2 (3) of the Covenant, in respect of the author.

State party's observations on the merits

7.1 By note verbale of 16 April 2013, the State party submitted its observations on the merits and reiterated that the author had not exhausted domestic remedies.

7.2 The State party submits that, following the directives of the Supreme Court, the First Information Report has been lodged at the District Police Office, Okhaldhunga, on the charge of the culpable homicide of Mr. Katwal, and the criminal investigation is ongoing. In the course of investigation, the District Police Office had recorded statements made by Usak Katwal, the son of Mr. Katwal, and by Bir Bahadur Adhikari, and Nepal Police Headquarters issued a directive to the District Police Office for a prompt investigation. These actions support the State party's argumentation with respect to the non-exhaustion of domestic remedies. Because the author's claims can be addressed under the existing criminal justice system and with further supplementary action by the transitional justice mechanisms, the State party asks the Committee not to consider the communication on the merits.

7.3 The State party confirms its commitment to separate the conflict-related cases and conflict-era criminal cases, which fall under the criminal jurisdiction, and investigate them under the regular judicial mechanisms, apart from supplementary envisioned transitional justice mechanisms. It refers to the Supreme Court decision in *Govinda Prasad Sharma "Bandi"* v. *Attorney General et al.* of 2 April 2014, according to which the prosecution of cases involving serious human rights violations during the armed conflict should not be halted because transitional justice mechanisms have not been put in place, but should be investigated and prosecuted under the regular criminal justice system. The State party claims that the law enforcement agencies would abide by the decision of the competent court and reiterates that the bills on the formation of the Truth and Reconciliation Commission and the Enforced Disappearance Commission have been tabled in the Parliament and are in line with the Supreme Court's decision. At the same time, it expresses its commitment to ensure that enforced disappearance is a crime punishable by law.

7.4 The State party mentions that although the author did not file a petition in the District Court, she received Nr 300,000 as interim relief, and that the author and her children would be entitled to reparation following the investigation and recommendation of the competent court and the transitional justice mechanisms.

Author's comments on the State party's observations

8.1 On 12 June 2014, the author provided her comments on the State party's observations, stating that the State party does not add new arguments to those already raised in its submission on admissibility and that it continues to challenge the admissibility of her communication. At the same time, the State party fails to explain exactly which effective and available remedies the author should have exhausted and to provide justification for the decision not to institute criminal proceedings in her husband's case. The author submits that in the absence of an investigation leading to the criminal prosecution of the perpetrators, the State party has not discharged its obligations under the Covenant and is responsible for a continuing violation of articles 6, 7, 9, 19 and 16, alone and in conjunction with article 2 (3) of the Covenant.

8.2 When it states that the investigation in Mr. Katwal's case is ongoing, the State party is simply reiterating the information it provided in 2011. Notwithstanding the Committee's conclusion that non-judicial mechanisms, such as truth commissions, should not be considered as domestic remedies to be exhausted for admissibility purposes, the State party continues to argue that the Truth and Reconciliation Commission is a necessary domestic procedure to exhaust. In this regard the author stresses that although the President of Nepal approved the Truth and Reconciliation Commission Act on 11 May 2014, on the one hand this Act breaches international law and, on the other, no transitional justice mechanism had been established at the time of submission of the author's comments. Moreover, when the State party submitted its observations on the merits, the Act had not yet been signed and it was not known whether or when the transitional justice mechanism would be established. The State party was thus asking the author to exhaust a non-existent remedy. The author reiterates that the prosecution of those responsible for gross human rights violations cannot depend on the establishment of a transitional justice mechanism, and that the arguments of the State party in that regard lack legal basis. She refers to the Committee's concluding observations on the State party's second periodic report under the Covenant, in which the Committee pointed out that not a single conflict-related case had been successfully prosecuted through the criminal justice system (see CCPR/C/NPL/CO/2, para. 5 (a)).

8.3 The author claims that the Truth and Reconciliation Commission Act breaches international law and contravenes the Supreme Court's decision of 2 January 2014.[22] She identifies several major flaws of the Act: the Commission has a mandate to conduct mediation to reconcile victims and perpetrators even in cases of gross human rights violations (section 22) and any legal action is prohibited in mediated cases; the Commission has the power to recommend amnesties even for those involved in crimes under international law and gross human rights violations (section 26); there is a lack of criminalization of offences that amount to crimes under international law; the system of referral to prosecution mechanisms is inadequate; and the rights of victims to reparation are not recognized (sections 2 (e) and 23). In the light of the above, unless the Act is amended, it does not offer an effective remedy.

8.4 The author contends that the State party's observation that a criminal investigation is ongoing and that the author will obtain redress after its conclusion. She states that she has been waiting for more than 13 years to learn the truth about the fate of her husband and the State party suggests she has to wait longer, for an indefinite period.

8.5 Lastly, the author submits that the State party has not refuted any of her complaints on the merits and in this light asks the Committee to consider as established the facts described in her original communication.

Further submission by the State party

9. By note verbale of 11 August 2014, the State party informed the Committee that the Truth and Reconciliation Commission Act had been enacted in 2014 and that the Truth and Reconciliation Commission and the Enforced Disappearance Commission would be established soon. The State party also submits that the bills to criminalize torture and enforced disappearance have been drafted and are in the process of resubmission to Parliament. The State party reiterates its position that the criminal justice system cannot provide full remedy to the victims of conflict without the transitional justice mechanisms and assures the Committee that the author's claims will be addressed fully after the establishment of the said mechanisms.

[22] The date of the Supreme Court decision in the State party's observation on merits is given as 2 April 2014.

Further submission by the author

10. On 4 September 2014, the author reiterated her earlier submissions and noted that the Committee had already declared her communication admissible. Regarding the State party's arguments about the future establishment of the transitional justice mechanisms on the basis of the Truth and Reconciliation Commission Act, the author refers to several international sources that identify drawbacks of the Act and states that a mechanism based on this Act would not meet international standards and, thus, would not offer an effective remedy.

Consideration of the merits

11.1 The Human Rights Committee has considered the present communication in the light of all the information made available to it by the parties, as required under article 5 (1) of the Optional Protocol.

11.2 The Committee takes note of the author's unrefuted allegations that Mr. Katwal disappeared when, on 13 December 2001, he went to the army barracks in Okhaldhunga, as he was convoked to do; that he was severely tortured there, according to the witnesses who saw him, seemingly unconscious and in blood-stained clothes, being carried by security personnel on the morning of 14 December 2001; that there was no information about his fate until 2007; and that during that period the authorities did not provide the author with truthful information about the whereabouts of her husband. In the absence of any other relevant information on file, the Committee considers that Mr. Katwal's deprivation of liberty, followed by a period of refusal by the authorities to acknowledge that deprivation and by the concealment of his fate, constituted an enforced disappearance.

11.3 The Committee considers that while the Covenant does not explicitly use the term "enforced disappearance" in any of its articles, enforced disappearance constitutes a unique and integrated series of acts that represents continuing violation of various rights recognized in that treaty.

11.4 The Committee notes the author's allegations that her husband was arrested by representatives of the State party's armed forces and was kept incommunicado from the moment of his arrest until his alleged death; that even though he was last seen in December 2001, no ex officio investigation was carried out until 2007. The Committee also notes that the Prisoner Investigation Team established in 2006 by the Supreme Court confirmed that Mr. Katwal had been tortured by security personnel after his arrest and died in detention, as a result of this torture, on 16 December 2001. The Committee further notes that the body of Mr. Katwal was never returned to his family.

11.5 The State party has indicated that the criminal investigation in the case of Mr. Katwal is ongoing. However, the Committee notes that the State party has not provided sufficient information to confirm that there is such a criminal investigation and that it is effective. Thirteen years after the events in the present case, the circumstances of Mr. Katwal's death have not been fully clarified and the perpetrators have not been held accountable, although they were supposedly identified in the report of the Prisoner Investigation Team. Furthermore, the Supreme Court concluded that Mr. Katwal had been killed due to torture inflicted on him by army officers. The Committee thus considers that the killing of Mr. Katwal in army custody and the lack of effective investigation by the State party constitute a violation of Mr. Katwal's right to life under article 6 of the Covenant.

11.6 The author alleges that her husband was severely tortured in detention, which was confirmed by the investigation ordered by the State party's Supreme Court. The Committee recognizes the degree of suffering involved in being held indefinitely without contact with the outside world. It recalls its general comment No. 20 (1992) on article 7, in which the

Committee recommended that States parties should make provisions to ban incommunicado detention. In the present case, in the light of the findings of the Supreme Court, the Committee finds that the acts of torture to which the author's husband was exposed and his incommunicado detention constitute a violation of article 7 of the Covenant. In the light of this conclusion, the Committee decides not to consider separately the author's claims under article 10 of the Covenant.

11.7 The Committee takes note of the anguish caused to the author by the disappearance of her husband, the failure of the State party to provide her with adequate reparation, the alleged threats against and ill-treatment of the author, the misleading explanations provided to her for a long period by the authorities about the whereabouts of her husband, and the continued impossibility of obtaining the remains of her husband. The Committee considers that the material on file reveals a violation of article 7 of the Covenant with respect to the author.

11.8 The Committee takes note of the author's complaint under article 9 (1–4), to the effect that there is no evidence that her husband, who was arrested and detained by security personnel, was notified about the reasons for and the basis of his arrest and brought before a judge to challenge the lawfulness of his detention. In the absence of any specific information by the State party in this regard, due weight must be given to the author's allegations. Accordingly, the arrest and detention of the author's husband constitute a violation of article 9 of the Covenant.

11.9 In respect of the author's allegation under article 16, the Committee reiterates its established jurisprudence, according to which intentionally removing a person from the protection of the law for a prolonged period of time may constitute a refusal of recognition as a person before the law if the victim was in the hands of the State authorities when last seen and, at the same time, if the efforts of his or her relatives to obtain access to potentially effective remedies, including judicial remedies, have been systematically impeded.[23] In the present case, until 2007 the authorities repeatedly provided the family of Mr. Katwal with misleading information about his fate, making it impossible for them to find him. Having not received any comments by the State party on this matter, the Committee finds that the enforced disappearance of Mr. Katwal deprived him of the protection of the law from the moment of his arrest, in violation of article 16 of the Covenant.

11.10 The author invokes article 2 (3) of the Covenant, which requires States parties to ensure that individuals have accessible, effective and enforceable remedies for asserting the rights recognized in the Covenant. The Committee reiterates the importance it attaches to States parties establishing appropriate judicial and administrative mechanisms for addressing alleged violations of rights under domestic law. It refers to its general comment No. 31, in which it states that a failure by a State party to investigate allegations of violations could in and of itself give rise to a separate breach of the Covenant.

11.11 The facts in the present case indicate that Mr. Katwal did not have access to an effective remedy while in detention. Since the moment of her husband's disappearance, the author repeatedly approached authorities in different cities, looking for him, but was provided with misleading information about his whereabouts and fate. Thirteen years after Mr. Katwal's arrest, despite the author's efforts and the Supreme Court order for a criminal investigation, no thorough and effective investigation has been conducted by the State party in order to elucidate the exact circumstances surrounding his disappearance and possible

[23] See communications No. 2051/2011, *Basnet* v. *Nepal*, Views adopted on 29 October 2014, para. 8.7; No. 2031/2011, *Bhandari* v. *Nepal*, Views adopted on 29 October 2014, para. 8.8; No. 1495/2006, *Madoui* v. *Algeria*, Views adopted on 28 October 2008, para. 7.7; and No. 1905/2009, *Khirani* v. *Algeria*, Views adopted on 26 March 2012, para. 7.9.

death, and to bring the perpetrators to justice. Further, the Nr 300,000 granted to the author as compensation cannot be seen as constituting an adequate remedy commensurate to the serious violations inflicted. Accordingly, the Committee concludes that the facts before it reveal a violation of article 2 (3), in conjunction with articles 6, 7, 9 (1–4) and 16, with regard to Mr. Katwal, and of article 2 (3), in conjunction with article 7, with respect to the author herself.

12. The Human Rights Committee, acting under article 5 (4) of the Optional Protocol to the International Covenant on Civil and Political Rights, is of the view that the information before it discloses a violation by the State party of articles 6, 7, 9 (1–4) and 16, and of article 2 (3), read in conjunction with articles 6, 7, 9 (1–4) and 16 of the Covenant with regard to Mr. Katwal, and of article 7, and article 2 (3) read in conjunction with article 7, of the Covenant with respect to the author herself.

13. In accordance with article 2 (3) of the Covenant, the State party is under an obligation to provide the author with an effective remedy, including by: (a) conducting a thorough and effective investigation, with a view to locating the remains of Mr. Katwal and returning them to his family; (b) prosecuting, trying and punishing those responsible for the deprivation of liberty, torture and enforced disappearance of Mr. Katwal and making the results of such measures public; and (c) providing effective reparation, including adequate compensation and appropriate measures of satisfaction, to the author for the violations suffered. The State party is also under an obligation to take steps to prevent the occurrence of similar violations in the future. In this connection, the State party should ensure that its legislation allows the criminal prosecution of the facts that constituted a violation of the Covenant.

14. Bearing in mind that, by becoming a party to the Optional Protocol, the State party has recognized the competence of the Committee to determine whether or not there has been a violation of the Covenant and that, pursuant to article 2 of the Covenant, the State party has undertaken to ensure to all individuals within its territory or subject to its jurisdiction the rights recognized in the Covenant and to provide an effective and enforceable remedy when a violation has been established, the Committee wishes to receive from the State party, within 180 days, information about the measures taken to give effect to the Committee's Views. The State party is also requested to publish the present Views and to have them widely disseminated in the official languages of the State party.